Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

ROGER COWAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT WAS CORRECT IN REFUSING TO USE THE COMMON LAW DEFINITION OF THE TERM FORGE IN FAVOR OF A DICTIONARY DEFINITION OF THAT TERM AS USED IN 18 U.S.C. § 505?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Roger Cowan respectfully prays that a writ of certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit issued on July 7, 1997.

REPORTS OF OPINIONS IN THE CASE

The United States Court of Appeals for the Tenth Circuit affirmed Petitioner's judgment of conviction and sentence in *United States v. Cowan*, 116 F.3d 1360 (10th Cir. 1997). *See* Appendix A. The Tenth Circuit Court of Appeals for the Tenth Circuit denied Petitioner's Petition for Rehearing. *See* Appendix B.

GROUNDS OF JURISDICTION

On August 7, 1997, the United States Court of Appeals for the Tenth Circuit affirmed the Petitioner's conviction previously entered by the United States District Court for the District of Wyoming, *United States v. Cowan*, 116 F.3d 1360 (10th Cir. 1997). On August 22, 1997, the United States Court of Appeals for the Tenth Circuit denied the Petitioner's petition for rehearing.

The Court has jurisdiction to review by writ of certiorari under 28 U.S.C. § 1254. This matter satisfies Rule 10 of the Rules of the Supreme Court of the United States in that the Tenth Circuit Court of Appeals has entered a decision in conflict with the decisions of other United States court of appeals on the same important matter.

Jurisdiction in the district court arose by virtue of 18 U.S.C. § 3231. Jurisdiction in the United States Court of Appeals for the Tenth Circuit arose by virtue of 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

This Petition involves the interpretation of 18 U.S.C. § 505 which is reproduced in Appendix D.

STATEMENT OF THE CASE

The parties entered into a stipulation of fact which stipulation was presented to the district court upon the Defendant's Motion to Dismiss and the Government's response to the Motion. The stipulation provided that the losing party would appeal to court of appeals. The Motion and procedure followed Rule 12 (b) of the Federal Rules of Criminal Procedure and the procedure set forth in *United States v. Hall,* 20 F.3d 1084 (10th Cir. 1994). The district court accepted the stipulated facts and took the matter under advisement and ultimately denied the Motion (Appendix C). Following the Denial of the Motion the Defendant entered a Conditional Plea pursuant to Rule 11 of the Federal Rules of Criminal Procedure preserving his right to appeal the matter to the Court of Appeals. The Defendant was sentenced following a Pre-Sentence Report to five months imprisonment. In addition to the sentence of incarceration, Mr. Cowan was ordered to pay a special assessment of $50.00, and was sentenced to a term of two years of supervised release

following his release from incarceration, the first five months of the supervised release to be spent on home confinement.

The district court made findings and accepted facts at the Arraignment and at the Sentencing, basing some findings on those facts. The Government filed findings from the Wyoming Supreme Court as contained in the Defendant's consensual disbarment proceedings.

Roger Cowan was an attorney practicing as a general practitioner with a small law firm in Evanston, Wyoming, during the years of 1991 through 1995. A client retained Mr. Cowan's firm to investigate and pursue a products liability action against a major United States automobile manufacturer. The client engaged the firm, agreeing to pay a contingency fee should the firm succeed in recovering money damages for the client. The client called, sometimes four to five or six times a day inquiring about his case. During this time the law firm went from a four-attorney firm to a two-attorney firm. In addition, the one remaining partner accepted a contract with the Wyoming Attorney General's office to deal with Worker's Compensation cases. Mr. Cowan found himself falling behind on his work. As a result of the backlog and the repeated calling by the client, Mr. Cowan informed the client that the matter had been filed. Although the applicable statute of limitations had not passed, nor had any time limitations passed, the client continued to call. In order to "get the client off his back" Mr. Cowan prepared a mediation decision document. The document was created in either late 1993 or early 1994. Although this document was never filed, and although Mr. Cowan did not remember ever giving the document to the client, the client obtained

the document. At the bottom of the document was drawn the name of Alan B. Johnson as a United States District Court Judge. In March or April of 1994, the client contacted the court and discovered that no lawsuit had been filed. The client confronted Mr. Cowan who admitted that no suit had been filed. The client and Mr. Cowan continued their relationship, however, and Mr. Cowan did file the case in a timely manner. The case was later dismissed for reason of the failure to designate an expert witness. The client then retained other counsel to reopen the case and complete discovery. Neither Mr. Cowan nor the law firm were paid nor were they reimbursed for costs or expenses.

After the district court dismissed the client's case for failure to designate an expert, Mr. Cowan and the client met and the client was informed of the dismissal. Mr. Cowan immediately, on July 26, 1995, submitted his resignation to the Bar of the State of Wyoming, self-reporting his conduct and requested that he be allowed to resign. He entered into a stipulation with the Bar of the State of Wyoming which served as a basis for an Order of Disbarment.

The United States Grand Jury issued an Indictment against Mr. Cowan for forging a Judge's signature. Expert testimony was provided by Mr. Cameron Walker, Esq., whose testimony was included by Order of the district court as part of the stipulated facts. The parties acknowledged that the law concerning the intent to defraud as an element in the statute charged, was unclear in the Tenth Circuit, and that each party held their own views as to the significance of the facts. The parties agreed to submit

the issue to the district court based on a Motion to Dismiss, with the losing party having the right to appeal to the United States Court of Appeals for the Tenth Circuit. The district court issued its ruling denying the motion to dismiss holding that the intent to defraud was not an element of the charge under 18 U.S.C. § 505. The district court held in the alternative that if the intent to defraud was an element of the crime, the stipulated facts were sufficient to establish the element before a jury.

The United States Court of Appeals for the Tenth Circuit affirmed the decision of the United States District Court after a review *de novo*. The Tenth Circuit Court of Appeals held that the term forge as set forth in 18 U.S.C. § 505 did not include the common law requirement that there must be an intent to defraud. The Court used the definition of the term forge as contained in *Black's Law Dictionary* as the definition that most closely contained the elements that Congress intended.

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit Court of Appeals appears to be in direct conflict with the decision of the United States Courts of Appeals in the Sixth Circuit, the Seventh Circuit and the Eleventh Circuit. *Levinson v. United States*, 47 F.2d 470 (6th Cir. 1931), *United States v. Dyer*, 546 F.2d 1313 (7th Cir. 1976), *United States v. Bertrand*, 596 F.2d 150 (6th Cir. 1979), *United States v. London*, 714 F.2d 1558 (11th Cir. 1983). In addition the opinion of the Court of Appeals may be in conflict with the reasoning of a prior decision of this court in *United*

States v. Wells, ___ U.S. ___, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997). The question raised in this petition is thus of great importance to the bench, bar and litigants in the circuits of the United States.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT BY REFUSING TO USE THE COMMON LAW DEFINITION OF THE TERM FORGE IN FAVOR OF A DICTIONARY DEFINITION OF THAT TERM AS USED IN 18 U.S.C. § 505 HAS CREATED A CONFLICT IN THE CIRCUIT COURTS OF THE UNITED STATES.

Discussion

The United States Court of Appeals for the Tenth Circuit held that the term forge as set forth in 18 U.S.C. § 505 did not include the common law requirement that there must be an intent to defraud. The Court used the definition of the term forge as contained in *Black's Law Dictionary* as the definition that most closely contained the elements that Congress intended. By using that definition Mr. Cowan was guilty of the offense. By using the common law definition and the reasoning in the cases decided by other circuits Mr. Cowan's actions were not sufficient to fit within the elements of the offense.

The United States Supreme Court presumes that Congress incorporates the common law meaning of the terms it uses if those terms have accumulated settled meaning under the common law. *United States v. Wells*, ___ U.S. ___, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997).

The Courts of Appeals in the Sixth Circuit, the Seventh Circuit and the Eleventh Circuit. *Levinson v. United States*, 47 F.2d 470 (6th Cir. 1931), *United States v. Dyer*, 546 F.2d 1313 (7th Cir. 1976), *United States v. Bertrand*, 596 F.2d 150 (6th Cir. 1979), *United States v. London*, 714 F.2d 1558 (11th Cir. 1983) have held that the term forge as contained in 18 U.S.C. § 505 is defined by its common law definition and that the element at common law requires an intent to defraud. The elements of forge as found in the common law definition require an intent to defraud and that some financial gain or loss must have been intended.

> "The common-law crime of forgery contains as an essential ingredient fraudulent intent." This is well settled. We conclude that Congress must have used it intending thereby to couple with the intent to authenticate the intent to defraud . . . *Levinson v. United States*, 47 F.2d 470 (6th Cir. 1931), *United States v. Bertrand*, 596 F.2d 150, 151 (6th Cir. 1979).

Congress expressly decided that forgery is an element or they would not have used that word. Congress is also aware of the common law and Congress is aware that the Courts of Appeals for the Eleventh Circuit, the Sixth Circuit and the Seventh Circuit require the elements of financial gain or loss in any forgery prosecution under this statute. Those cases began in 1931, and Congress has not amended or changed the statute.

If there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. *McNally v. United States*, 483 U.S. 350, 359, 107 S.Ct. 2875, 2881 (1975). Congress has spoken

when it used the word forgery and when Congress has accepted the case law interpreting that word since the year 1931 when *Levinson* was published.

The phrase "to defraud" commonly refers "to wronging one in his property rights by dishonest methods or schemes," and usually signifies the deprivation of something of value by trick, deceit, chicane or overreaching." *McNally v. United States*, 483 U.S. 350, 358, 107 S.Ct. 2875, 2881 (1975) quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188, 44 S.Ct. 511, 512 (1924).

Not only do the common law definition and the natural reading of the statute suggest that the Tenth Circuit Court of Appeals adopted an incorrect definition, statutory history suggests that the requirement of some financial gain is required.

The statute 18 U.S.C. § 505 appears to have been adopted separately from the bankruptcy code which code was adopted by Congress in 1867. The statute first appeared in the general penal code in 1874 and was adopted verbatim from the bankruptcy code. The legislative intent appears to require a monetary fraud requirement in the statute. The court of appeals' comparison of separately enacted statutes is incorrect.

The language of § 505 first appeared in the *Uniform System of Bankruptcy*, adopted March 2, 1867 (Act of March 2, 1867, Ch. 176, 14 Stat. 517 at 539). The language was later adopted in the penal code by the Forty-Third Congress in the session of 1873-4 as published in the *Revised Statute of the United States Title 70, Ch. 5 at 1055.* The statute's origin is from the bankruptcy code and was specifically designed to deal with bankruptcy fraud. The

Report of the Committee on the Judiciary on the *Act to establish a uniform system of bankruptcy throughout the United States* on March 1, 1861 recommended against the uniform system. From that point to the time of passage, and during a Civil War, the Congress debated the legislation. The report of the Committee on the Judiciary is found at *H.R. 750, 36th Cong., 2nd Sess. No. 36-92 (1861) at 1.* The report analyzed the non-uniform practice in the United States and the abuse and problems existing under the old code. In the report the committee said that:

> It was not long after the act went into operation before the public attention was directed towards the proceedings in bankruptcy in different parts of the United States; and as it was soon seen that it gave no protection to creditors, but was converted into a shield for the dishonest practices of fraudulent debtors . . . (*id.* at 3).

The committee also observed that the practice of bankruptcy in England lacked the ability of the debtor to discharge his debts. The abuses of the English system were compared with the current system. The main difference in the United States Code is the ability to discharge debts. The committee was concerned about the evils and abuses which would arise under such a system. The committee noted that:

> But, as a general rule, it is the reckless speculator, or the extravagant and unprincipled dissipator of other men's means, who is found with a vast indebtedness and no assets. These men are the banes of the business world – the corrupters and the drones of business society. Such men have no claims on the community which they injure; and every principle of true morality as

> well as of sound policy is opposed to any legislation for their relief. (*Id.* at 6).

Later the committee, after having evaluated the proposed legislation, its constitutionality and the abuses, noted that the members of the committee and others agreed with the comments of Sir Samuel Romelley during the 1817 debate in the British Parliament when he said that:

> it was notorious that the grossest frauds were practiced under these laws; that fictitious debts very often superseded *bona fide* claims; that, indeed, many persons entirely subsisted by the fraudulent management of bankrupt concerns – by the superintendence of perjury and the subordination of perjury." . . . (*Id.* at 24)

The committee continued the discussion of Sir Samuel Romelley by noting "instead of protecting the honest creditor, these laws were 'a shield to the fraudulent debtor'; instead of dispensing justice; they encourage and disseminate 'the most flagitious of crimes.' " The committee recommended against passage of the act (*Id.* at 24).

This background of the bankruptcy legislation indicates that a fraud upon the court for monetary gain was a main concern in passing this legislation. The elements, then, of § 505 arise directly from the legislation that finally passed. It is more than obvious that the intent to defraud was an essential element in the legislation and the financial gain was the evil that Congress addressed.

18 U.S.C. § 505 contains three separate words to describe a judge's unauthorized signature. The first is when the signature of any judge is a forgery for the purpose of authenticating a proceeding, as contained in

first portion of the statute. The Indictment only charges that first portion. The second is when the seal of a court is forged or a counterfeit, and the third is when the signature is false or counterfeit and is introduced in evidence. All of these address separate evils that the Congress felt were present when debtors filed their actions in bankruptcy. The unscrupulous debtors' intent on the filing of fictitious claims or perjury should be discouraged by the language of § 505. The fictitious bankruptcy claims, the fictitious bankruptcy filings and the false discharges were contemplated.

Congress brought that same intent into the criminal code. The concept that a violation of the Code of Professional Responsibility gives rise to a crime because of a speculated loss is not what Congress intended. The more logical approach would be to view the statute from its history and require a charge of this nature to be supported by evidence that the document was intended to defraud a creditor or person out of money by reason of a false document. That approach is consistent with the bankruptcy and the common law history. That approach is also consistent with the common law definition of the term forge.

Congress expressly decided that forgery is an element or they would not have used that word. Congress is also aware of the common law and Congress is aware that the Courts of Appeals for the Eleventh Circuit, the Sixth Circuit and the Seventh Circuit require the elements of financial gain or loss in any forgery prosecution under this statute. Those cases began in 1931, and Congress has not amended or changed the statute. The statutory and common law histories dictate that the reasoning of the

Levinson case, and the cases of *Dyer, supra, Bertrand, supra, London, supra,* are correct.

After the document had been given or shown to the client, the client was informed that no lawsuit had been filed and that the matter must go forward from the beginning. The client did not change his position. The intent at the time that Mr. Cowan placed the writing on the piece of paper was merely to end the constant calls and to prepare the case. No financial gain flowed to Mr. Cowan or financial loss to the client, nor was any such gain or loss intended. The document was ineffective and was incapable of causing anyone harm or benefit. There was not even a gain or loss of any sort, nor was there an intent to defraud under any definition. The mens rea is not criminal, although it was unethical.

When the Tenth Circuit split itself from the Sixth, Seventh, and Eleventh Circuit and found that the requirement of intent to defraud is not required or that financial gain or loss is not required as an element of the offense, then that Circuit changed the intent of Congress. There is no reason to believe that Congress adopted the definition as contained in a dictionary rather than the common law definition. Not every remedy for a wrong should be a criminal remedy. Mr. Cowan was not a criminal. He had no criminal mind as Congress intended and required. Congress did not intend forgery to mean that the act of drawing a signature of a Judge onto a document is a criminal act.

At the time Mr. Cowan placed the signature on the document, his only purpose was to placate the client until such time as the Complaint was ready to file in the

district court. It is undisputed that that was the only purpose. There was no intent to create or to use the document for any fraudulent or criminal purpose. There was no financial gain to Mr. Cowan or financial loss to the client, nor was any such gain or loss intended. The document was ineffective and was incapable of causing anyone harm or benefit. There was not a gain or loss of any sort, nor was there an intent to defraud under a common law definition. The mens rea is absent in that there was no fraudulent intent. The relationship between the client and Mr. Cowan was not built on nor was it maintained by the document. The client had not changed a legal position, had not gained or lost anything of value, nor had he given up a right. The fact is that the Defendant was able to prepare the case in a more calm and orderly manner to the benefit of the client. The case as prepared was correct, an expert was retained, and the case proceeded in an orderly and efficient manner. The mens rea is not criminal, although it was unethical.

The client did not part with anything of value, either monetary or otherwise. In fact the client profited by allowing the attorney to prepare and file the matter in a timely manner. It is important to note that the Statute of Limitations was not imminent nor were any time periods violated. The Court noted in the arraignment proceeding the fact that he recalled delaying the filing of a law suit himself during his practice because of the distasteful nature of the lawsuit. In every professional practice there are matters that are urgent because they are urgent and others where the urgency is only in the mind of the client.

Mr. Cowan had an insistent client that became a difficult client because of his constant telephone calls. The intent to placate the client until the case was filed did not in any manner cause the client a loss, monetary or otherwise.

If a law professor when giving her students an examination, placed a document into the exam question which document contained a judge's signature, for the purposes of the exam, would this act be a forgery under the statute? Obviously not. The government could argue that since the law professor was paid, this is an economic gain. The mens rea is absent and therefore the act of drafting a document for a final examination is not a crime. The act of drawing a judge's name onto a document is not what the statute prohibited, but the act with the elements of forgery including the intent to defraud. There was no intent to make an attempt at a legitimate order, to defraud or to commit a criminal act. Possibly one of the grand jurors noted the issue at page 29 of Mr. Walker's testimony as contained in the stipulation of fact:

> Q. I am more puzzled by his evidently mishandling the suit after he finally filed it. What was the point of not doing his best on that? I mean, he's already out in the open on this thing now and then he doesn't
>
> A. I have – I have struggled with that myself and I don't have a real good answer, other than to tell you that product liability lawsuits are not something that anyone can walk out of law school and do. They are not – these are not simple cases and when you take on GM and I have been involved in lawsuits very much like this one, they are difficult, hard-fought lawsuits and they

> take a lot of experience and they take a lot of financial resources on the part of the lawyer . . .
>
> . . .
>
> Q. Which may have been the reason he didn't file it in the first place?
>
> A. It may have been. He may have been in over his head, he may have been in over his head as far as the financial commitments go. But other than that I really don't have an explanation because . . .

Certainly for a "small town" lawyer, the Defendant should have referred the matter out, at least as lead counsel, however the insistent client and the work load can become overwhelming. The fact that the Defendant sought "breathing space" to work is not the criminal intent that the § 505 addressed in its enactment or in its interpretation.

The district court at sentencing when applying the Guidelines to the sentence said:

> . . . And the truth is that I can't honestly make myself believe that forging a judge's signature on a purported order of this court is really a fraud. I think that it is really an obstruction of justice. That's my honest opinion.

CONCLUSION

The United States Court of Appeals for the Tenth Circuit was incorrect in its use of a Dictionary definition of the term forge, rather than use its common law definition. Under the common law definition the undisputed facts are as a matter of law insufficient to support a finding that the elements of 18 U.S.C. § 505 are satisfied. The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

Roger COWAN, Defendant-Appellant.

No. 96-8094.

United States Court of Appeals,
Tenth Circuit.

July 7, 1997.

Defendant was convicted in the United States District Court for the District of Wyoming, Clarence A. Brimmer, Jr., J., pursuant to his conditional guilty plea, of forging signature of federal judge, and he appealed. The Court of Appeals, Baldock, Circuit Judge, held that intent to defraud was not element of offense.

Affirmed.

Francis Leland Pico, Assistant United States Attorney (David D. Freudenthal, United States Attorney, and David A. Kubichek, Assistant United States Attorney, with him on the brief), Casper, WY, for Plaintiff-Appellee.

Daniel G. Blythe, Blythe & Steiner-Lewis, Cheyenne, WY, for Defendant-Appellant.

Before SEYMOUR, Chief Judge, PORFILIO, and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

This appeal presents the question of whether the intent to defraud is an element of the crime of forging the signature of a federal judge in violation of 18 U.S.C.

§ 505. Section 505 provides in relevant part: "Whoever forges the signature of any judge . . . of any court of the United States, . . . for the purpose of authenticating any proceeding or document, knowing such signature . . . to be false . . . shall be fined under this Title or imprisoned not more than five years, or both." We hold that the intent to defraud is not an element of the crime.

I.

A grand jury indicted Defendant-Appellant Roger Cowan with one count of forging a federal judge's signature in violation of 18 U.S.C. § 505. The parties presented stipulated facts to the district court. Defendant then moved to dismiss the indictment against him pursuant to Fed.R.Crim.P. 12(b), arguing that the stipulated facts did not support the indictment's criminal charge because the stipulated facts did not as a matter of law establish the element of the intent to defraud. *See United States v. Hall*, 20 F.3d 1084, 1087-88 (10th Cir.1994) (where the facts are uncontroverted, the district court may examine the factual predicate for the indictment to determine whether the government as a matter of law is incapable of proving its case beyond a reasonable doubt). The district court denied the motion to dismiss holding that the intent to defraud was not an element of the § 505 charge. The district court held in the alternative that assuming the intent to defraud was an element of the crime, the stipulated facts were sufficient to establish the element before a jury. Thereafter, Defendant entered a conditional plea of guilty pursuant to Fed.R.Crim.P. (11)(a)(2), reserving his right to appeal the district court's order denying his motion to dismiss the indictment. Our jurisdiction arises

under 28 U.S.C. § 1291. We review de novo, *United States v. Myers*, 106 F.3d 936, 941 (10th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2446, 138 L.Ed.2d 205 (1997), and affirm.

II.

Defendant was an attorney licensed to practice law in Wyoming. In the winter of 1991-1992, Carl Hostetter retained Defendant under a contingent fee arrangement to pursue a personal injury claim against General Motors arising from an automobile accident. During 1992 and 1993, Hostetter repeatedly contacted Defendant to determine the status of his case. Defendant informed Hostetter that Defendant had filed suit when in fact he had not. Upon further inquiries from Hostetter, Defendant informed him that Defendant had submitted the case to mediation when in fact he had not.

Defendant prepared a document under the heading of the United States District Court for the District of Wyoming entitled "Mediation Decision – Hostetter v. G.M., et al." The document purported to award Hostetter money damages for his injuries in the amount of $696,000.00. At the end of the document, Defendant without authorization placed a signature purporting to be that of United States District Judge Alan B. Johnson. At the time Defendant prepared the document, he had yet to file suit on Hostetter's behalf. Nevertheless, Defendant informed Hostetter of the favorable "decision." In January 1994, Hostetter obtained a copy of the "mediation decision" from Defendant.

To make a long story short, Hostetter eventually contacted the United States District Court in Cheyenne, Wyoming, to check on the status of his lawsuit when his award was not forthcoming. The court advised Hostetter that no such lawsuit existed. The indictment against Defendant followed.

III.

Our starting point in interpreting 18 U.S.C. § 505 is its language. *See United States v. Lira-Arredondo,* 38 F.3d 531, 533 (10th Cir.1994). Absent a clearly expressed legislative intent to the contrary, we will deem the plain language of a statute conclusive and look no further into its meaning. *See e.g., United States v. McCullah,* 76 F.3d 1087, 1108 (10th Cir.1996), *cert. denied,* ___ U.S. ___, 117 S.Ct. 1699, 137 L.Ed.2d 825 (1997); *Prows v. Federal Bureau of Prisons,* 981 F.2d 466, 469 (10th Cir.1992). Thus, we begin by noting that nowhere does 18 U.S.C. § 505 say the crime of forging a federal judge's signature requires an intent to defraud. Nothing in the text of the statute even suggests that Congress intended to include the intent to defraud as an element of the crime. *Cf. United States v. Wells,* ___ U.S. ___, ___, 117 S.Ct. 921, 927, 137 L.Ed.2d 107 (1997) (holding that materiality of falsehood is not an element of making a false statement to a federally insured bank under 18 U.S.C. § 1014).[1] To the contrary, § 505's

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[1] In *Wells,* the Supreme Court was confronted with a question of statutory interpretation similar to the question before us. The Court refused to read into 18 U.S.C. § 1014 the element of materiality where a plain reading of the statute's text did not require it. In so holding, the Court rejected a long list of

plain language only requires that a defendant charged under the statute knowingly forge the signature of a federal judge "for the purpose of authenticating any proceeding or document." Although Congress did not define the term "forge" as used in § 505, the term generally is defined as "[t]o fabricate, construct, or prepare one thing in imitation of another thing, with the intention of substituting the false for the genuine. . . . " *Black's Law Dictionary* 650 (6th ed.1990). In this case, Defendant prepared a court document knowing it to be false, and placed the district judge's signature thereon for the purpose of making the document appear authentic to his client. The plain language of § 505 requires nothing more.

Despite § 505's plain language, Defendant points out that the few circuit court decisions addressing the issue have concluded that the intent to defraud is an element of § 505, which the government must prove beyond a reasonable doubt to obtain a conviction. In *Levinson v. United States*, 47 F.2d 470, 471 (6th Cir.1931), the Sixth Circuit opined that "Congress, regardless of its intent, by the use of the verb 'forge,' limited the application of the statute, in so far as cases of intended authentication are concerned, to those in which the elements of common-law forgery enter." Because the common law crime of forgery required an intent to defraud, *see generally Moskal v. United States*, 498 U.S. 103, 121-128, 111 S.Ct. 461, 472-76, 112 L.Ed.2d 449 (1990) (Scalia, J., dissenting), so did § 505. The subsequent decisions in *United States v. Bertrand*, 596

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circuit court decisions holding that materiality was an element of the crime. *Wells*, ___ U.S. at ___, ___ n. 3, 117 S.Ct. at 924, 925 n. 3.

F.2d 150 (6th Cir.1979), and *United States v. London*, 714 F.2d 1558 (11th Cir.1983), followed *Levinson*'s rationale.[2]

In *United States v. Barber*, 39 F.3d 285, 287 (10th Cir.1994), we acknowledged that "in other circuits . . . [§ 505] necessarily includes the element of intent to defraud." Without deciding whether the intent to defraud was an element of the crime under § 505, we held that the district court did not commit plain error in failing to instruct the jury that financial loss or gain was an element of the crime: "[D]efendant argues financial loss or gain is a required element of 18 U.S.C. § 505; however, he has failed to demonstrate this requirement. Section 505 itself does not mention financial gain or loss, *nor does it even mention 'intent to defraud.'* " *Id.* at 288 (emphasis added).

Admittedly, one principle of statutory construction is that "where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *United States v. Turley*, 352 U.S. 407, 411, 77 S.Ct. 397, 399, 1 L.Ed.2d 430 (1957). The Supreme Court has recognized, however, that "Congress' general purpose in enacting a law may prevail over this rule of

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[2] In *United States v. Dyer*, 546 F.2d 1313 (7th Cir.1976), the Seventh Circuit discussed but did not decide whether the intent to defraud is an element of § 505. *Id.* at 1316 ("If it were necessary to reach the issue, much could be said for the . . . view that to prove the offense . . . the government was required to establish that the judge's signature was 'forged,' and that this meant it was necessary to prove the signer's intent.").

statutory construction" where the common law is inconsistent with that purpose. *Moskal v. United States*, 498 U.S. 103, 117, 111 S.Ct. 461, 470, 112 L.Ed.2d 449 (1990). This is so because principles of statutory construction " 'exist to discover and not to direct the Congressional will.' " *Huddleston v. United States*, 415 U.S. 814, 831, 94 S.Ct. 1262, 1272, 39 L.Ed.2d 782 (1974) (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542, 63 S.Ct. 379, 383, 87 L.Ed. 443 (1943)). Given the basic principle that a court should interpret statutory language according to its terms, we must guard against interpretations which might defeat the statute's purpose as reflected by its text. The purpose of § 505 is to protect the reputation and integrity of the federal courts, their official documents and proceedings, rather than simply to outlaw a narrow category of fraud. The statute applies whenever someone attempts to impugn this integrity by forging a federal judge's signature onto a document in order to make that document appear authentic. A forged signature on a document which the forger intends to appear authentic is the only intent requirement of § 505.[3] Our construction of § 505 is true to both its text and purpose.

A review of the texts of other related statutes lends support to our construction of § 505. *See Hubbard v. United States*, 514 U.S. 695, 700-02, 115 S.Ct. 1754, 1758, 131

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[3] Contrary to Defendant's assertions, the Government does not take the position that the act of drawing a federal judge's signature onto a document alone is a criminal act. Such a reading of the statute would eliminate the express requirement that the forgery be made "for the purpose of authenticating" the document.

L.Ed.2d 779 (1995) (proper method of analyzing a statutory term's "context" to determine when a presumptive definition must yield requires an examination of the text surrounding the word in question and the texts of other related statutes). Chapter 25 of Title 18 of the United States Code proscribes numerous acts pertaining to counterfeiting and forgery. Like § 505, the texts of other statutes in Chapter 25 designed to protect the integrity of government functions do not include the intent to defraud as an element of the crime of forgery. *E.g.*, 18 U.S.C. § 485 (prohibiting forgery of coins or bars in denominations greater than five cents); 18 U.S.C. § 490 (prohibiting forgery of one and five cent coins); 18 U.S.C. § 493 (prohibiting forgery of writings issued by certain federal financial institutions); 18 U.S.C. § 496 (prohibiting forgery of documents pertaining to imports and customs duties); 18 U.S.C. § 497 (prohibiting forgery of letters patent); 18 U.S.C. § 498 (prohibiting forgery of military certificates of discharge); 18 U.S.C. § 499 (prohibiting forgery of military passes); 18 U.S.C. § 501 (prohibiting forgery of domestic postage stamps); 18 U.S.C. § 502 (prohibiting forgery of foreign postage stamps); 18 U.S.C. § 506 (prohibiting forgery of government seals).

By comparison, Congress uses the phrase "with intent to defraud" no less than twenty times in Chapter 25 to define the elements of a crime. In at least four of those instances, Congress has used the term "forges" together with the phrase "with intent to defraud." *E.g.*, 18 U.S.C. § 471 (prohibiting forgery of federal obligations "with intent to defraud"); 18 U.S.C. § 478 (prohibiting forgery of foreign obligations "with intent to defraud"); 18 U.S.C. § 482 (prohibiting forgery of foreign bank notes

"with intent to defraud"); 18 U.S.C. § 500 (prohibiting forgery of postal service money orders "with intent to defraud"). We are satisfied that if Congress had intended to make the intent to defraud an element of the crime of forging a federal judge's signature under 18 U.S.C. § 505, it would have done so expressly.

Defendant attempts to show that Congress intended to include the intent to defraud as an element of the crime under § 505 by tracing the history of the statute. The statute first appeared as part of the Bankruptcy Act adopted in 1867. Much like its present day counterpart, the statute originally read in relevant part: "[I]f any person shall forge the signature of a judge . . . of the court, . . . for the purpose of authenticating any proceeding or document, . . . knowing such signature . . . to be false . . . any such person shall be guilty of a felony. . . . " Uniform System of Bankruptcy, ch. 176, § 46, 14 Stat. 517, 539 (1867).[4] Defendant thus concludes that the statute was aimed at dishonest debtors and necessarily includes as an element the intent to defraud for financial gain. No elucidating legislative history, however, exists to support Defendant's claim and without more we are hesitant to stray from the plain language of the statute which notably does not limit the statute's effect to bankruptcy actions or require the intent to defraud. In reaching this conclusion, we are mindful of the Supreme Court's admonition in *Hubbard v. United States*, 514 U.S. 695, 702-04, 115

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[4] Congress subsequently reenacted and recodified the statute as part of the federal penal code with only minor changes on four occasions. *See* Rev. Stat. § 5419 (1877); 35 Stat. 1112 (1909); 62 Stat. 714 (1948); 108 Stat. 2147 (1994).

S.Ct. 1754, 1759, 131 L.Ed.2d 779 (1995) (internal quotations omitted):

> Although the historical evolution of a statute – based on decisions by the entire Congress – should not be discounted . . . a historical analysis normally provides less guidance to a statute's meaning than its final text. In the ordinary case, absent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it.

Accordingly, the judgment of the district court is

AFFIRMED.[5]

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[5] Defendant also contends that the district court erred in sentencing him under the obstruction of justice guidelines, U.S.S.G. § 2J1.2, rather than the fraud guidelines, U.S.S.G. § 2F1.1. To locate the guidelines that apply to a criminal charge, U.S.S.G. § 1B1.2(a) directs the district court to "[d]etermine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction." Application Note 1 to § 1B1.2 refers to the Statutory Index. The Statutory Index for 18 U.S.C. § 505 refers to both § 2J1.2 and § 2F1.1. Where the index refers the court to more than one guideline section, Application Note 1 to § 1B1.2 directs the court to determine the applicable guidelines based upon the nature of the offense of conviction. In this case, the district court properly rejected application of the fraud guidelines because Defendant's conduct was not designed to defraud Hostetter of any property. Rather, Defendant's deceit in forging Judge Johnson's signature jeopardized Hostetter's right to have his legal claims heard, and thus is more properly akin to an obstruction of justice.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 96-8094
v.	)	
ROGER T. COWAN,	)	
Defendant-Appellant.	)	

ORDER

Filed August 22, 1997

Before **SEYMOUR, PORFILIO** and **BALDOCK,** Circuit Judges.

Appellant's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled so the suggestion for rehearing en banc is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Patrick Fisher
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 95-CR-106-B
	)	
vs.	)	
	)	
ROGER COWAN,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT

Defendant Roger Cowan has filed a motion to dismiss the indictment against him. In the indictment, the Grand Jury charges that Cowan violated 18 U.S.C. § 505, which makes it illegal to forge a judge's signature, by forging the signature of Chief Judge Alan B. Johnson. Cowan asks the Court to dismiss the indictment, arguing that "intent to defraud" is an essential element under § 505 and that the stipulated facts do not satisfy this element. The Court FINDS and ORDERS as follows:

Background

The parties do not dispute the relevant facts, and have filed a fact stipulation. Roger Cowan is an attorney who was licensed to practice in the State of Wyoming and before this Court. In late 1991 or early 1992, Cowan formed an attorney-client relationship with Carl Hostetter. Cowan agreed to represent Hostetter in a lawsuit

Hostetter wanted to file against General Motors for injuries Hostetter allegedly suffered in an automobile accident. Cowan agreed to a contingent fee arrangement, whereby he would receive a percentage of any recovery.

Cowan began investigating Hostetter's claim and preparing for litigation, but did not file suit. Hostetter repeatedly contacted Cowan wanting to know the "status" of his case. Cowan wanted to "get Hostetter off his back," so he told Hostetter that he had already filed suit.

In late 1993, Cowan told Hostetter that the case had been submitted to mediation. Cowan then prepared a document entitled "Mediation Decision – Hostetter vs. G.M. et. al" and signed Judge Johnson's name above the line labeled "United States District Court Judge." Cowan admits that this action was intentional and that Judge Johnson did not authorize Cowan to place his signature on that, or any other, document. In January, 1994, Cowan told Hostetter that Judge Johnson had issued a mediation decision in Hostetter's favor, and Hostetter obtained a copy of the decision from Cowan's office. The "decision" awarded Hostetter a total of $696,000 in damages, including a lump sum payment of $375,000.

In late January or early February of 1994, Hostetter told Cowan that he wanted to purchase a vehicle. Cowan assured Hostetter that payment from the mediation decision would arrive shortly. Cowan gave Hostetter a photocopy of a check for $375,000 purportedly issued by Aetna Insurance Company. Cowan told Hostetter that this check represented the lump sum payment that Hostetter would receive pursuant to the mediation decision. No such check actually existed.

Hostetter took a copy of the fictitious check to a car dealer in Midvale, Utah, and purchased a 1993 Cadillac. Hostetter wrote a personal check for $31,659.50, but the car dealer did not negotiate the check. Presumably, the dealer agreed not to negotiate the check until Hostetter informed the dealer that he had deposited his forthcoming settlement check.

In March, 1994, the car dealer twice contacted Cowan. The dealer had not received any payments on the Cadillac and wanted to ensure that the settlement was legitimate. Cowan assured him that it was.

During this time, Cowan told Hostetter that the United States District Court in Cheyenne inadvertently sent the check to an attorney in Colorado Springs. Cowan said that he would retrieve the check and everything would be all right.

In March, 1994, Cowan told Hostetter that the Colorado Springs attorney had sent the check to Cowan via Airborne Express, but the check was now lost in either Labarge, Wyoming or Big Piney, Wyoming. Hostetter drove to Labarge, Big Piney, and Kemmerer, Wyoming, looking for the Airborne Express vehicle so he could retrieve the check. Hostetter returned to Evanston, Wyoming, and contacted Cowan. Cowan then told Hostetter that the Airborne Express driver ended up in Salt Lake City, Utah, abandoned his truck, and that the police were now looking for the driver for stealing the check. One week later, Cowan told Hostetter that the police were no longer looking for the driver because the driver had not cashed the check.

In March or April, 1994, Hostetter contacted the United States District Court in Cheyenne and inquired about the status of his lawsuit and settlement. The clerk's office advised Hostetter that no lawsuit had ever been filed on his behalf.

Armed with this information, Hostetter confronted Cowan. Cowan admitted that he had lied about the Aetna Insurance check, but continued to insist that there was a valid mediation decision. Cowan claimed that his efforts to settle the case had been unsuccessful, and that they would now have to go to court.

Based on these representations, Hostetter allowed Cowan to continue as his attorney and authorized Cowan to file a lawsuit against G.M. on his behalf. Cowan filed this lawsuit, but the Court entered summary judgment against Hostetter and dismissed the case.

Hostetter then retained another lawyer who currently is attempting to reopen the civil case against G.M. and is pursuing a malpractice claim against Cowan and his law firm.

Based on these facts, the Grand Jury indicted Cowan and charged that he knowingly forged a judge's signature and thereby violated 18 U.S.C. § 505. Cowan has filed a motion to dismiss the indictment.

Analysis

Cowan argues that "intent to defraud" is an essential element of the crime of forging a judge's signature, and that the stipulated facts do not support a finding that

Cowan intended to defraud anyone when he forged Judge Johnson's signature. The Court disagrees.

I. "Intent to Defraud" is not an Essential Element of 18 U.S.C. § 505

It is a crime to forge "the signature of any judge . . . for the purpose of authenticating any proceeding or document . . . knowing such signature . . . to be false or counterfeit." 18 U.S.C. § 505. Cowan argues that "intent to defraud" is an essential element of this offense.

Case law interpreting this statute is sparse. The Sixth, Seventh, and Eleventh Circuits have held that "intent to defraud" is a necessary element of the offense. *See United States v. Bertrand*, 596 F.2d 150, 151 (6th Cir. 1979) (citing *Levinson v. United States*, 47 F.2d 470 (6th Cir. 1931)); *United States v. Dyer*, 546 F.2d 1313, 1316 (7th Cir. 1976); *United States v. London*, 714 F.2d 1558, 1563 (11th Cir. 1983). In a case involving this statute, the Tenth Circuit noted these cases, but explicitly declined to decide whether "intent to defraud" is an essential element of § 505. *United States v. Barber*, 39 F.3d 285, 288 (10th Cir. 1994). The question thus remains unanswered in this circuit.

The *Levinson* case provides the foundation for the rule followed by the Sixth, Seventh, and Eleventh Circuits. In *Levinson*, the Sixth Circuit focused on the word "forge" and held that, regardless of what Congress intended to do, it had limited the statute to the common law offense of forgery. *Levinson*, 47 F.2d at 471. Because "intent to defraud" was an essential element of common law forgery, the court held that "intent to defraud" was

necessarily an essential element of § 505. *Id.* This Court cannot agree. After reviewing other forgery statutes in Title 18, the Court concludes that the Sixth, Seventh, and Eleventh Circuits erred by imputing the "intent to defraud" element into § 505.

Section 505 does not mention "intent to defraud". *Barber*, 39 F.3d at 288. However, several other federal forgery statutes specifically include "intent to defraud" as an element of the offense. *See, e.g.*, 18 U.S.C. § 478 (making it a crime to forge, with "intent to defraud," a bond, obligation, or security of the United States); 18 U.S.C. § 482 (making it a crime to forge, with "intent to defraud," foreign bank notes); and 18 U.S.C. § 500 (making it a crime to forge, with "intent to defraud," a money order); (*see also* 18 U.S.C. §§ 484, 494, and 495.)

Congress expressly included "intent to defraud" as an element in some forgery statutes, but not in § 505. This strongly suggests that Congress did not intend for "intent to defraud" to be an essential element of § 505. Congress obviously knew how to make "intent to defraud" an essential element when it wanted to. With § 505, it apparently did not want to. "[W]here Congress includes particular language in one section of a statute but omits it in another of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The Court therefore presumes that Congress intentionally and purposely excluded the "intent to defraud" requirement from § 505.

Section 505 prohibits forgery "for the purpose of authenticating a document" and also prohibits offering such a document in evidence. A document is authentic if it is genuine and reliable, legally vested with all necessary formalities, and is reliable as evidence. *Black's Law Dictionary* 132 (6th Ed. 1990).

Section 505 should not be limited to forgeries designed to defraud. Although § 505 certainly prohibits forgery with intent to defraud, it applies to a broader range of activity. Section 505 prohibits any forgery that makes a false document appear genuine. Someone who forges a judge's signature to authenticate a document does so to deceive or trick someone else. The goal of § 505 is to protect the integrity of federal courts, their proceedings, and their documents. Section 505 applies whenever someone attempts to impugn this integrity by forging a judge's signature, regardless of whether he intended to defraud anyone. A document forged with "intent to deceive" but not "intent to defraud" is no less a threat to the integrity of the federal courts and their documents.

Other statutes designed to protect the integrity of other government functions do not include "intent to defraud" as an essential element. *See* 18 U.S.C. § 498 (prohibiting forgery of military passes or discharge certificates); 18 U.S.C. § 503 (prohibiting forgery of postage stamps). Section 498 has no intent requirement, and § 503 requires only the intent to make the forged postage stamp appear genuine. Likewise, § 505 only requires that the perpetrator forge the judge's name to authenticate the document.

Military passes and postage stamps convey official approval and authenticity. So does a judge's signature. Its integrity must be protected in all circumstances, not just where an individual intends to defraud someone.

The stipulated facts clearly show that Cowan placed Judge Johnson's signature on the fake mediation decision to deceive his client. Cowan forged Judge Johnson's signature and fooled Hostetter into believing that the mediation decision was genuine. In doing so, Cowan violated § 505.

B. Even if "Intent to Defraud" is an Essential Element of § 505, the Stipulated Facts Are Sufficient to Establish That Element

Although the Court finds that "intent to defraud" is not an essential element of § 505, Cowan's actions would satisfy this element even if it were an element. The Tenth Circuit's ruling in *Barber* defines "intent to defraud" and discusses what evidence is sufficient to meet this element. After applying these holdings to the stipulated facts, the Court concludes that the stipulated facts contain sufficient evidence to allow a jury to conclude that Cowan acted with "intent to defraud."

The facts of *Barber* are strikingly similar to this case. Barber, an attorney, agreed to represent a client in a civil lawsuit that another attorney already had initiated on the client's behalf. Barber failed to prosecute the case, and this failure led the court to dismiss the lawsuit. *Barber*, 39 F.3d at 287. Barber did not report this dismissal to his client, but rather told his client that the case was proceeding slowly. This charade continued for three years, when

Barber finally told his client that the court had dismissed the case. Barber then produced a fake dismissal order bearing the forged signature of the presiding judge. The fake order stated that the court had dismissed the case nearly three years later than it actually had. *Id.*

The client wanted to appeal the dismissal. When the client contacted the judge's chambers to find out how much time he had to file his notice of appeal, he learned that the court had dismissed the case for failure to prosecute three years earlier. The government prosecuted Barber for forging a judge's signature. *Id.*

The trial court instructed the jury that "intent to defraud" was an element of the offense, but did not require the jury to determine that the fraud resulted in financial gain or loss. Barber challenged this instruction on appeal. *Id.* at 287-88.

Without addressing the issue of whether "intent to defraud" was an essential element of § 505, the Tenth Circuit held that "intent to defraud" did not require a showing of financial gain or loss. *Id.* at 288. The perpetrator need only "act for personal benefit or to deprive the other person of something. That something need not be money." *Id.* A person acts with "intent to defraud" if he deceives or cheats another. *Id.* Evidence that Barber accepted a retainer, lied to his client, and deceived his client by creating false documents and forging a judge's signature was sufficient to demonstrate that Barber intended to deceive his client and *"satisfie[d] each element explicitly included in § 505."* *Id.* at 289 (emphasis added).

If Barber's actions satisfied the element of "intent to defraud," Cowan's actions in this case would satisfy this

element as well. Cowan entered an attorney-client relationship with Hostetter and agreed to initiate a lawsuit on Hostetter's behalf. Cowan not only failed to file a lawsuit, he also repeatedly lied to Hostetter about the status of his case and constantly created new and inventive stories to cover his lies. Like Barber, Cowan deceived his client by creating false documents and forging a judge's signature. The Court has no doubt that the stipulated facts show that Cowan acted with "intent to defraud" as described in *Barber*.

Conclusion

The Court finds that "intent to defraud" is not an essential element of § 505. Even if "intent to defraud" was an essential element of § 505, there is sufficient evidence from which a jury could conclude that Cowan acted with "intent to defraud." Therefore, the Court **ORDERS** that the defendant's motion to dismiss the indictment is **DENIED**.

Dated this 16th day of May, 1996.

/s/ Clarence Brimmer
UNITED STATES
DISTRICT JUDGE

APPENDIX D

18 U.S.C. § 505. Seals of courts; signatures of judges or court officers

Whoever forges the signature of any judge, register, or other officer of any court of the United States, or of any Territory thereof, or forges or counterfeits the seal of any such court, or knowingly concurs in using any such forged or counterfeit signature or seal, for the purpose of authenticating any proceeding or document, or tenders in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, shall be fined under this title or imprisoned not more than five years, or both.

(June 25, 1948, c. 645, 62 Stat. 714; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(K), 108 Stat. 2147.)